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Finding Place for Freedom, Security and Justice: The European Union's Claim to Territorial Unity*

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Abstract:

Legal and political analyses tend to downplay the problem of spatiality evoked in the notion of an “Area” of Freedom, Security and Justice, focusing instead on the distinct policy fields covered by this triad of values. Whatever its merits, this analytic strategy neglects the central claim hidden in what seems to be but a flatulent title: the closure of space into a legal place, into a bounded region, is ingredient to the very possibility and concrete realization of freedom, security and justice. This paper explores this claim in four stages. Initially it examines and rejects the preliminary objection that globalisation marks the irreversible decline of legal place as a constitutive feature of social life. Then it develops a legal topology of the Area of Freedom, Security and Justice, arguing that two different modes of the inside/outside distinction are at stake in Articles 61 and 63 ECT. Subsequently, drawing on Communication 459/98 and the Preambles to the Treaties, the paper outlines a topogenesis of the Area, describing the representational process by which its boundaries are posited. The paper concludes by asserting that the primacy of security over freedom and justice is related to the paradox governing a fledgling European public order: in the process of enforcing the Union's claim to an own place, the Area of Freedom, Security and Justice becomes unrecognisable as the Union's own place.

KeyWords:

European identity, spatial theory, immigration policy, security/internal

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I. An Image of Unity

The boundary separating land from water emerges somewhere north of the Kanin Peninsula, meanders around Norway, Sweden and Finland and briefly ducks into St. Petersburg; then it turns west, takes the Danish hurdle and dips toward France, but not before pausing to let the beholder take in the British Isles, Ireland and, far out at sea, Iceland; after reaching Cabo de São Vicente, the westernmost point of the continent, the boundary presses eastward, progressively separating Spain, Italy and Greece from the Mediterranean; finally, it heads north,



threading up the western side of the Bosphorus and the Black Sea before plunging into darkness somewhere east of the Crimean Peninsula. A circle of twelve yellow stars straddles the blue continent, casting its pale light as far as the northern coast of Africa, faintly visible at the lower side of the frame.

This well-known image, made available to the public on the European Union's Internet site,¹ depicts the Union as a spatial unity. Various devices contribute to the depiction of unity: the border separating land from water, the contrast between light and dark blue, the circle of stars. Paradoxically, the very devices that serve to depict the European Union as a spatial unity also undercut this unity. Notice, to begin with, that by modulating the shades from dark to light blue, the image ensures that the passage from Asia to Europe takes place imperceptibly, intimating in a blurred sort of way the Ural mountain range *and* concealing the geographical continuity that links both continents. Moreover, the passage from dark to light takes place well to the left of the frame's edge, in such a way that the roving eye, finding no reason to dwell in a zone of dark indeterminacy, quickly returns to the determinateness of Europe. And then the circle of stars: a circle is the geometric form *par excellence* of a harmonious closure. It would have been wonderful if the circle could have been large enough to embrace Spain and Portugal; but increasing its diameter would have had the embarrassing effect of gathering in a substantial part of northern Africa—and the entire Asian portion of Turkey. So, instead, the diameter of the circle is rendered *smaller* than the continent. But this artifice creates a new problem, for in the very process of depicting spatial unity it differentiates between a centre and a periphery.²

¹ <http://europa-eu-un.org/images/home/1img.gif>.

² The circle of twelve stars on a blue background is, incidentally, a homage to the Virgin Mary by the Catholic designer, Arsène Heitz, who sought inspiration in Chapter 12, verse 1 of the Book of Revelations: "And there appeared a great wonder in heaven; a woman clothed with the sun, and the moon under her feet, and upon her head a crown of twelve stars". See Vittorio Messori, "Dall'aureola dell'Immacolata le dodici stelle dell'Europa: La bandiera dell'Unione ispirata alla corona della Vergine", in *Corriere della Sera*, 14 July 2003. I am grateful to Gido Berns for having brought this article to my attention.

This image reveals, it would seem, the highly problematic status of the spatial unity the European Union claims for itself, not least when constituting itself as an “Area of Freedom, Security and Justice”. In the words of Article 2 of the Treaty on European Union (hereinafter cited as TEU), the Union seeks to “maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime”. As critics have pointed out, the area in which freedom, security and justice are to reign is a spurious geographical unity. Moreover, even if one were to accept that Europe is a geographical unity, the fact remains that the European Union also extends its reach to overseas territories *outside* Europe, as attested to, amongst others, by Ceuta and Melilla—the Spanish enclaves in Morocco, and French Polynesia and New Caledonia in the Pacific, not to mention the Falklands in the South Atlantic. Once this point has been made, critical attention withdraws from the problem of spatiality evoked in referring to the European Union as an “area”, and is henceforth redirected to the specific policy fields grouped under the general categories “freedom”, “security” and “justice”. In particular, there is growing concern about the fact that security has become the overriding imperative of the Area, largely crowding out freedom and justice.

The concern about the primacy of security is more than justified, and I will return to examine it in greater detail at the end of this paper. Nonetheless, this line of critical thinking, despite its merits, tends to take for granted that the spatial unity claimed for the Area of Freedom, Security and Justice could be reduced to *geographical* unity. Although correct as far as it goes, the charge that Europe is a bogus geographical unity is moot: whether spurious or authentic, geographical unity is, as we shall see, irrelevant to an understanding of the unity of a *legal* space in general, and of the Area of Freedom, Security and Justice in particular. Paradoxically, therefore, this reductive critical strategy cannot take seriously the fundamental claim hidden in what at first blush is no more than a flatulent title: freedom, security and justice are *spatially* determined values. This remains, however, too imprecise a formulation, for it suggests that “area” and “space” are interchangeable terms, such that one could just as well speak of a “Space of Freedom, Security of Justice”. And such is indeed the case in the French and Spanish versions of the Treaties, for example, which refer respectively to an “*espace*” and an “*espacio*”. Yet a certain linguistic awkwardness that arises when, in English, one substitutes “area” for “space”, hints at a conceptual distinction that is absolutely essential to our subject. Whereas “place”, harking back to the Greek notion of *topos*, can be provisionally defined as a bounded region, “space”, especially in its modern connotations, stands for a boundless extension. On this view, one of the politically and philosophically most challenging claims raised by the Amsterdam Treaty, a claim reiterated by the draft Constitution for Europe, is that the terms of this triad are topical: *place is ingredient to the very possibility and concrete actualisation of freedom, security and justice*.

Hence, while it is certainly meaningful to argue that one of the main tasks confronting the European Union, both in terms of policy-making and constitutional architecture, is to achieve a “right balance” between these values, what interests me in this paper is to explore what sense can be made of the claim to territorial unity involved in the notion of an *Area* of Freedom, Security and Justice. This interest is both philosophical and political. Indeed, the neutrality and unobtrusiveness of this notion disappear

as soon as one spells out the implications of asserting that the Area is a legal place: no freedom, no security, no justice without inclusion—literally; by the same token, no freedom, no security, no justice without exclusion—literally. Yet, and this is the burning question underlying the problem of a skewed balance, does not the exclusion giving rise to the European Union’s placial unity also promote servitude, insecurity and injustice? Is not a legal place what renders possible all claims to freedom, security and justice, and yet, at the same time, by excluding those outside that place, undercuts these very same claims? Can the terms of this triad ever simply be located within a legal place? *Where*, then, are freedom, security and justice?

I will argue hereinafter that the key to these issues is the reflexive constitution of territoriality. Indeed, legal communities are not simply located somewhere *in* space, like, say, a boulder lying in a field. A community must—literally—*find place* in a continuous process of relating *to* space, even in those comparatively recent cases, historically speaking, when its external borders are cartographically demarcated and stabilized. A relation to an own place, hence a claim to territorial unity, is no less constitutive of “sedentary” communities, such as the nation-state or the European Union, than it is of a nomadic community. In other words, the question concerning what it means for a community to be a territorial unity is neither given in advance nor fixed once and for all; on the contrary, part of what it means to be a community is to have to continuously reinterpret the claim to an own place. Thus, territorial unity involves a *reflexive* form of collective identity: taking up a relation to an own place necessarily engages a community in a relation to *itself*—and vice versa.

II. The Decline of Place?

Before exploring, with respect to the European Union, why and how place and reflexive identity might be ingredient to the very possibility and concrete actualisation of freedom, security and justice, it is first necessary to pass a preliminary threshold test: is place, when defined as a bounded region, *at all* ingredient to these terms? This preliminary question merits consideration because an influential current of contemporary, primarily sociological, research argues that processes of globalisation have profoundly transformed social space. Would it not be necessary to examine the kind of spatiality involved in the Area of Freedom, Security and Justice in the perspective of such transformations, rather than appeal once again to spatial categories typical of the nation-state? More pointedly, may we uncritically assume that the Area of Freedom, Security and Justice can be adequately characterized as a place if, as has been asserted, globalisation marks the irreversible decline of place as a constitutive feature of social life?

1. “Transnational Social Spaces”

Such, in substance, is the thesis advocated by Ulrich Beck: “The association of place with community or society is breaking down. The changing and choosing of place is the model for biographical glocalization”.³ The close connection between place and community is, as he sees it, paradigmatic for the *national* community. The primacy of communities organized in the form of closed spaces with stable borders corresponds to the period of history in which the nation-state has been the dominant form of political

³ Ulrich Beck, *What is Globalization?*, trans. Patrick Camiller (Cambridge, Mass.: Polity Press, 2000), p. 74 [hereinafter cited as *Globalization*].

organization. Territoriality has been immensely influential in the process of conceptualising the nation-state; categories such as people, class, citizen, state and culture presuppose and give expression to a “territorial bias”, such that “humanity is divided into political unities, defined and organized as closed territorial states”.⁴ Globalisation challenges this paradigm in a fundamental way by transforming the structure of social space. Negatively defined, globalisation consists in a “deterritorialisation of the social”:

A key experience of modern society is that the space of society is no longer defined by or linked to presence at one place . . . this means that geographical and social proximity do not coincide. One need not live in one place to live in community, and to live in the same place in no way means to live in community.⁵

Positively defined, globalisation gives rise to a novel spatial paradigm, which Beck calls transnational social spaces. This new paradigm “cancel[s] the local associations of community that are contained in the national concept of society. The figure of thought at issue joins together what cannot be combined: to live and act both here and there”.⁶

Importantly, the nascence of transnational social spaces involves a transformation of the nature and function of spatial boundaries. Borders, in the paradigm of the nation-state, are related to “exclusive” distinctions that organize space and identities in disjunctive patterns. Inclusive distinctions, on the other hand, are conjunctive. As such, “they facilitate a different, more mobile and, if you like, cooperative concept of ‘borders’. Here borders arise not through exclusion but through particularly solid forms of ‘double inclusion’”.⁷ In short, inclusive distinctions make it possible to be on both sides of the border, here *and* there, rather than here *or* there. These ideas seem to fit well with the European Union. For, arguably, one of the central objectives of the European Union is to promote “place polygamy”⁸ and to foster a sense of overlapping loyalties. Indeed, the construction of the European Union is premised, amongst others, on the idea that the borders between the Member States of the Union forfeit their exclusive character, taking on an inclusive status. This transformation suggests that the European Union has become, as Beck explicitly contends, a “transnational structure”,⁹ irreducible to the closed territoriality of the nation-state.

The “either-or” character of national state boundaries is intimately related, on Beck’s view, to a no less disjunctive characterization of familiarity and strangeness: “The road to the nation state is paved with oppression. Its law reads: Either-or. Externally, this implies exclusion, construction of strangeness and enemy stereotypes . . . ; internally it means forced assimilation, expulsion and destroying the culture and life of ‘deviant’ groups . . .”¹⁰ Globalisation, fuelled by factors such as individual mobility, tourism and commercial relations, undermines and surpasses the nationally based dichotomy between the familiar and the strange, such that the sharp “either-or” disjunction is increasingly substituted by the blurred conjunction “and”: “Individualization

⁴ Ulrich Beck, “Wie wird Demokratie im Zeitalter der Globalisierung möglich?—Eine Einleitung”, in Ulrich Beck (ed.) *Politik der Globalisierung* (Frankfurt: Suhrkamp, 1998) pp. 13, 15 [hereinafter cited as *Demokratie*].

⁵ *Id.*, at 12.

⁶ Beck, *Globalization*, *supra* note 3, at 28.

⁷ *Id.*, at 51.

⁸ Beck, *Demokratie*, *supra* note 4, at 73.

⁹ Beck, *Globalization*, *supra* note 3, at 159. See also Beck, *Demokratie*, *supra* note 4, at 31.

¹⁰ Ulrich Beck, *The Reinvention of Politics: Rethinking Modernity in the Global Social Order*, trans. Mark Ritter (Cambridge, Mass.: Polity Press 1997), p. 74, translation altered.

processes, considered globally, abolish prerequisites for constructing and renewing national oppositions between the familiar and the strange”.¹¹

The passage from disjunctive to conjunctive boundaries, and from disjunctive to conjunctive manifestations of the familiar and the strange, characterizes the European project. Beck notes that “[m]any are tortured by the remarkably essentialist question: What is Europe? Not uncommonly the answer states what Europe *was*. ‘There can be no return to Europe, for the simple reason that Europe only exists in the museum of rhetoric’”.¹² Somewhat less rhetorically, Beck makes the point that Europe cannot be reduced to any single identity. Not surprisingly, the confusing question whether Europe is a political unity misses the point entirely: not only is there no political Europe but, for the time being, its non-existence is not experienced as a problem or deficiency. Moreover, the European Union marks the demise of exclusive sovereignty, that is, of the principle that “control over a determinate territory cannot be exercised at the same time by two authorities”.¹³ The transfer of sovereign rights to the European Community shows, in effect, that the legal orders of the Member States and the European Union “overlap”: two different legal orders and their attendant authorities exercise legal power over the same territory.

Returning to our threshold question, is it wise, in the face of this array of empirical materials and sociological arguments, to take for granted that the Area of Freedom, Security and Justice is a *place*? Does not the assumption that place is ingredient to freedom, security and justice remain blind to the spatial innovation introduced by the European Union? Pointedly, does not this line of inquiry serve an ideological function by contributing to maintaining the “appearance of self-evidence, ‘naturalness’ and ‘insuperability’”¹⁴ the closed nation-state claims for itself?

2. “One and the Same Territory”

The shortest and most direct answer is factual, of course, and consists in pointing out that the lifting of internal borders and barriers between the Member States coincides with the positing of external borders that determine the European Union as a novel territorial unity. In the words of Article 14(2) of the Treaty Establishing a European Community (hereinafter referred to as ECT), “[t]he internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty”. And Article 3(2) of the draft Constitution for Europe reiterates and summarizes the guiding principle of Titles IV ECT and VI TEU, asserting that “the Union shall offer its citizens an area of freedom, security and justice without internal frontiers . . .” In both Articles, an “area” is a bounded region, a *legal place* in our provisional definition of this concept. The “double inclusiveness” of borders, to which Beck refers, may hold with respect to borders between the Member States, but certainly not with respect to the external borders of the Union. The inclusiveness of the Area of Freedom, Security and Justice goes hand in hand with exclusion. How must we interpret this state of affairs? Does it suggest that although the European Union has *in fact* not yet succeeded in entirely superseding the claim to territorial unity governing the nation-state, moving beyond this claim is *in principle* both conceptually possible and normatively desirable? Or, on the contrary, is

¹¹ *Id.*, at 75, translation altered.

¹² Beck, *Globalization*, *supra* note 3, at 156. Beck cites an article by Rolf F. Sieferle.

¹³ Beck, *Demokratie*, *supra* note 4, at 15.

¹⁴ *Id.*, at 14-15.

a claim to territorial unity a general and necessary feature of a legal community as such?

Any answer to this problem must begin by reconsidering what Beck calls the “association of place with community”. Can it be assumed, as he does, that this association is limited to national communities, until the meaning of place as such and the nature of its relation to community have been clarified? Although social geography, cultural studies and philosophy offer a cornucopia of studies on place, we can limit ourselves to the butt of Beck’s critique, namely, *legal* place and its relation to *legal* community.¹⁵

His view on legal place boils down to two presuppositions. The first is that, defined as a closed space with fixed boundaries, territoriality is a *precondition* for the exercise of state power. “States have fixed boundaries that both stake out and ground their space of authority (*Herrschaftsraum*). Within these boundaries, they can issue laws and administer justice”.¹⁶ By defining territoriality in this way, Beck draws on the doctrinal framework of Western public law in general, and German public law in particular, which defines territory as one of the essential “elements” of a nation-state. To cite Paul Laband, one of the best-known German public lawyers of the XIXth century, “the territory of the state constitutes the spatial sphere of power in which the state unfolds the rights of dominion (*Herrschaftsrechte*) to which it is entitled”.¹⁷ And Georg Jellinek formulates it as follows: “The land on which a state community is established characterizes from a legal perspective the space with respect to which the state authority can unfold its specific activity, that of governing (*Herrschens*)”.¹⁸ While Beck contests this paradigm, he does so because, in his opinion, globalisation has superseded it, not because this doctrinal framework misses the mark as to the nature of legal place as such. For Beck, no less than for the strand of public lawyers he criticizes, a territory is an empty, homogeneous “surface” that functions as the stage for acts of legal power.

This abstract conception of territoriality is linked to a second assumption concerning the nature of its unity. Jellinek voices the general opinion when he states that “only *one* state can deploy its power on one and the same territory”.¹⁹ What, however, determines a space as “one and the same” territory?

Two different answers to this question can be discerned in Beck’s analyses. The first is no doubt the answer he would himself provide if he were explicitly confronted

¹⁵ For an influential social geographical inquiry into place, see Yi-fu Tuan, *Topophilia* (Englewood Cliffs, N.J.: Prentice-Hall, 1974); for philosophical reappraisals of place see Jeff Malpas, “Finding Place: Spatiality, Locality, and Subjectivity”, in Andrew Light & Jonathan M. Smith (eds.), *Philosophies of Place* (Lanham: Rowman & Littlefield Publishers, 1998), p. 21, Jeff Malpas, *Place and Experience: A Philosophical Topography* (Cambridge: Cambridge University Press, 1999), Edward S. Casey, *The Fate of Place: A Philosophical History* (Berkeley: University of California Press, 1997), and Edward S. Casey, *Getting Back into Place: Toward a Renewed Understanding of the Place-World* (Bloomington: Indiana University Press, 1993), albeit that neither of these authors deals with the structure of legal place as such. There is as far as I know but one legal philosopher, Carl Schmitt, who has dealt extensively with legal place. In his late work, *Nomos der Erde im Völkerrecht des Jus Publicum Europaeum* (Berlin: Duncker & Humblot, 1950), Schmitt addresses this issue under the epithet *Ordnung und Ortung*—Order and Emplacement. I plan to critically engage with Schmitt’s thinking on the placial character of legal order in a separate paper, amongst other reasons because his challenge to liberal thinking (about Europe) is, to my mind, far more profound than has generally been recognized hitherto.

¹⁶ Beck, *Demokratie*, *supra* note 4, at 15.

¹⁷ Paul Laband, *Das Staatsrecht des Deutschen Reiches* (Aalen: Scientia Verlag, 1911), p. 190.

¹⁸ Georg Jellinek, *Allgemeine Staatslehre* (Kronberg: Verlag Athenäum, 1976 [1851]), p. 394. See also Carl Friedrich von Gerber, *Grundzüge des deutschen Staatsrechts* (Leipzig: Bernhard Tauchnitz, 1880), p. 66.

¹⁹ Jellinek, *Allgemeine Staatslehre*, *supra* note 18, at 396.

with the question. Contrasting territoriality to transnational social spaces, he asserts that in the latter “geographical and social proximity do not coincide”.²⁰ Implicitly, then, he takes for granted that the unity of a state territory is geographically determined, hence that the unity involved in referring to “one and the same territory” is geographical. Beck is entirely consistent with this view when he argues that the European Union is a transnational space, rather than a place, to the extent that “Europe is not a geographical but an imagined area”.²¹ It is indeed the case that a geographical criterion of unity will not work for Europe, as we have seen at the outset of this paper. The problem is, however, that a geographical criterion does not work for Beck’s “territorial state” either: Ceuta and Melilla, French Polynesia and New Caledonia, and the Falklands have already been mentioned; but think also, for example, of the United States. None of the apposite countries is a geographical unity (assuming we can at all make sense of this perplexing expression), yet each of these countries indisputably claims to be a territorial unity, and is prepared to defend its integrity wherever it may be compromised. The unity of a territory never has been—and never will be—reducible to geographical unity.

The second answer appears in an aside criticizing a territorially bound ethics: “there is no return to a morality that ends at one’s own (the national) garden-fence”.²² Despite the disparaging metaphor, this fragment is chiefly interesting because it is one of only two passages in which Beck allows himself to relinquish the disinterested position of the researcher speaking *about* a territory, to write from the interested position of the member of a (national) community who stands in relation *to* a territory. From this perspective, a territory appears as the community’s *own* place. He returns to this perspective a few lines further on, asserting that the contemporary moral state of affairs of a world society is characterized by “precisely those persons and questions with which we really have (or want to have) nothing to do, [yet] break into *our inner space* and cannot simply be sent away or expelled”.²³ Hence, *an inside and an own place are two sides of the same coin*. Notice that the positions inside and outside a territory are qualitatively rather than merely quantitatively different: an inside is *favoured* over what lies outside. A territory is not simply a tract of land within the homogeneous continuum of a global expanse. Paradoxically, the abstract view on territoriality espoused by modern Western public lawyers, and uncritically accepted by Beck, is incapable of explaining what determines territoriality, whether national or otherwise, as a legal *place*.

Crucially, the claim to an own place does not mean that a community lays claim to a territory as its “property”; instead, any such property relation is only possible on the ground of a more fundamental, *reflexive* relation. Consider, in this respect, the proem to Communication 459 of 1998, in which the European Commission delineates the main contours of an action plan to implement the Area of Freedom, Security and Justice:

The concept enshrines at European Union level the essence of what we derive from our democratic traditions and what we understand by the rule of law. The common values underly-

²⁰ See the citation germane to footnote 5 *supra*. And, agreeing with Luhmann, Beck notes that “the borders of the social system society have long ago ceased to coincide with geographical borders . . . In most social subsystems, communication takes place beyond state borders”. See Beck, *Demokratie*, *supra* note 4, at 29.

²¹ Beck, *Globalization*, *supra* note 3, at 156.

²² Beck, *Demokratie*, *supra* note 4, at 47.

²³ *Id.*, at 48 (emphasis added).

ing the objective of an area of freedom, security and justice are indeed longstanding principles of the modern democracies of the European Union.²⁴

Notice, pending a more detailed analysis of this passage in Section IV, that the Commission raises several claims in this compact statement: it holds that the Area gives legal expression to a pre-existent place—Europe, that this pre-existent place is a common place, and, finally, that “we, Europeans” can call this place “our own” by virtue of shared values. In a nutshell, the aforementioned passage offers a blueprint of the process in which the European Union *takes up a relation to place by relating to itself and, conversely, relates to itself in the process of relating to place*. The rejoinder to Beck has to be that in closing off an Area of Freedom, Security and Justice as its own place, the European Union is not only saying what it is; it is also and above all engaging in the ongoing reflexive process of constituting itself as a “we”, as a legal community.

It is significant that, immediately after this passage, the Commission adds the following:

The three notions of freedom, security and justice are closely interlinked. Freedom loses much of its meaning if it cannot be enjoyed in a secure environment and with the full backing of a system of justice in which all Union citizens and residents can have confidence. These three inseparable concepts have one common denominator—people—and one cannot be achieved in full without the other two. Maintaining the right balance between them must be the guiding thread for Union action.²⁵

As mentioned at the outset of this paper, critics have been quick to note that a “right balance” between these concepts is wanting. Although this critique is no doubt correct as far as it goes, the foregoing analysis shows that it overlooks the essential point: the European Commission asserts that *freedom, security and justice are tied to the reflexive process by which the Union lays claim to a place of its own and enforces this claim*.

This strong claim must now occupy our attention, as it considerably raises the ante, both politically and philosophically. Does not accepting the view that the European Union’s territorial unity involves a claim to an “own” place entail making of the Area of Freedom, Security and Justice an instrument at the service of a “politics of exclusion”, or what amounts to the same, a “politics of identity”? Is this not what is ultimately at stake in Beck’s caveat about ideological justifications of closed spaces?

To address this pressing issue, I propose to unpack the Commission’s assertion into three separate but internally related sets of questions:

(1) How are we to interpret the mutual implication between an *inside* and an *own* place with respect to the Area of Freedom, Security and Justice? What are the implications of this mutual implication for the claim that place is ingredient to freedom, security and justice? (Section III)

(2) Not only is there a mutual implication between an inside and an own place but this mutual implication is also constituted reflexively: the European Union closes *itself* off. Here is our second set of questions: How does the *self*-closure of the European Union into an Area of Freedom, Security and Justice come about? What are the implications of this self-closure for the Union’s claim that the Area is its *own* place? (Section IV)

²⁴ “Towards an area of freedom, security and justice”, in *Bulletin of the European Union* 7/8 (1998), p. 152 [hereinafter referred to as *Comm. 459/98*].

²⁵ *Id.*, at 152.

(3) How, finally, are we to interpret the primacy of security over freedom and justice in the context of the Union's claim to territorial unity? In what way does the preservation of territorial unity impinge on the concept and the practice of what the Commission, in Communication 459/98, calls "European public order"? (Section V)

III. A Legal Topology of the Area

The immanent critique of Beck's sociology of globalisation yielded a fundamental insight into the structure of legal place: in closing itself off as an inside with respect to an outside, a community posits a place as its own and vice versa. An *inside* and a claim to an *own* place are mutually implicating terms. How, then, are we to interpret this mutual implication with respect to the Area of Freedom, Security and Justice? Securing a correct approach to this question requires that we be constantly on guard against the temptation to reduce it to a geographical problem. Although all commentators would immediately agree that the European Union has an inside and an outside, most would add that this is so because this legal community does not comprise the whole surface of the earth. In contrast, a legal order that encompasses or aspires to encompass the entire world, e.g. the World Trade Organization, would, it seems, have no outside—hence no inside. By the same token, the determination of the Area of Freedom, Security and Justice as the European Union's own place would express no more than the contingent fact that there are foreign places situated outside the Union's sphere of validity, such that "own" and "foreign" denote different positions within a single continuum: the earth. Although plausible at first glance, this approach succumbs to the temptation of interpreting these concepts as geographical notions. Instead, their meaning must be elucidated *legally*. What is required, in other words, is a *legal topology*, an inquiry that exhibits the main features that determine the Area of Freedom, Security and Justice as a legal place.

1. Inside and Outside

Consider, in this light, the following provisions of the Treaty establishing the European Community:

Article 61: In order to establish progressively an area of freedom, security and justice, the Council shall adopt:

- (a) . . . measures aimed at ensuring the free movement of persons in accordance with article 14, in conjunction with directly related flanking measures with respect to external border controls, asylum and immigration . . . and measures to prevent and combat crime . . .
- (b) other measures in the fields of asylum, immigration and safeguarding the rights of nationals of third countries, in accordance with the provisions of Article 63; . . .

Article 63: The Council . . . shall . . . adopt:

- 1. measures on asylum . . .;
- 2. measures on refugees and displaced persons . . .;
- 3. measures on immigration policy within the following areas:
 - (a) conditions of entry and residence, and standards on procedures for the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunion,

- (b) illegal immigration and illegal residence, including repatriation of illegal residents.²⁶

Here, drawing on these Articles, are the main topographical features of the Area of Freedom, Security and Justice:

a) The territorial unity of the Area of Freedom, Security and Justice derives from the claim that the Area is a *common* place. In the words of Communication 459/98, “[t]he common values underlying the objective of an area of freedom, security and justice are indeed longstanding principles of the modern democracies of the European Union”. The Commission claims that this area is a common place by virtue of embodying shared values.²⁷ A common place involves two correlative dimensions. The first is *normative*, and concerns a claim about the common interest of the European Union. To be common, an interest must be bounded, and this means that a legal order necessarily selects certain values to grant them legal protection and discards other values as legally irrelevant.²⁸ This is tantamount to identifying the values on which the European Union confers legal protection as its *own* values. The second dimension is *physical*, insofar as the claim to normative commonality raised by a legal order is determined by means of boundaries that establish what counts as legally emplaced and misplaced behaviour—about which more later. Importantly, this physical dimension is not territoriality itself, as though values were superimposed on a territory that merely functions as the precondition of a legal order. Instead, values are ingredient to a territory *as such*; indeed, space becomes the Area of Freedom, Security and Justice—the European Union’s *own* place—when normatively mediated in terms of values deemed to be legally relevant. In contrast with the reifying dualism of the legal doctrine, a theory of territoriality that is attentive to its specific mode of appearance is resolutely monistic: only by *abstraction* can the Area of Freedom, Security and Justice be analysed into its physical and normative dimensions. Accordingly, and explicitly contesting the legal doctrine’s untoward conflation of territory with its physical dimension, I shall refer hereinafter to territory as the *concrete unity of both dimensions*.²⁹

This critical reformulation of the concept of territory casts the vexing notion of “divided” sovereignty in a new light. A leading legal philosopher vigorously defends a position close to that of Beck when noting that “absolute or unitary sovereignty is entirely absent from the legal and political setting of the European Community. Neither

²⁶ The forthcoming analysis does not discuss the provisions for the Area of Freedom, Security and Justice contemplated in what, at the time of writing this paper, remains a draft Treaty establishing a European Constitution. Nonetheless, the analysis, by virtue of its generality, could easily link the apposite provisions of the (draft) Treaty to the fundamental placial features of the Area as outlined hereinafter. Moreover, I concentrate on Title IV ECT rather than on Title VI TEU.

²⁷ To be sure, legislation concerning the policy fields covered by Title IV ECT has barely gotten off the ground. At the time of writing this paper, only Directives 2003/9/EC and 2003/86/EC, on minimum standards for the reception of asylum seekers and on the right to family reunification, have been enacted; to boot, the European Parliament seems set to bring this Directive before the European Court of Justice on procedural and material grounds. But the point of the matter is that giving legislative shape to the Area of Freedom, Security and Justice presupposes that commonality is intrinsic to the very notion of a legal place.

²⁸ See my article, “Dialectic and Revolution: Confronting Kelsen and Gadamer on Legal Interpretation”, in *Cardozo Law Review*, 24 (2003), p. 769.

²⁹ This approach is akin to that of Hannah Arendt, who notes that territory “is a political and a legal concept, and not merely a geographical term. It relates not so much, and not primarily, to a piece of land as to the space between individuals in a group whose members are bound to, and at the same time separated and protected from, each other by all kinds of relationships, based on a common language, religion, a common history, customs, and laws”. See Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (London: Penguin, 1994 [1963]), p. 262.

politically nor legally is any member state in possession of ultimate power over its own internal affairs”.³⁰ Plainly, however, this view rests on the reduction of territoriality to its physical dimension, such that one and the same territory is held to function as the precondition of two legal orders. However much at loggerheads, the emphatic defence by public lawyers such as Laband and Jellinek of the “impermeability” of the state, and the no less emphatic defence of “divided sovereignty” by contemporary public lawyers coincide in taking for granted that a territory is merely the material substrate of acts of power. If, however, one recognizes that a territory is the concrete unity of normative and physical dimensions, then the implication can only be that there is not one territory as the basis of two legal orders—the legal orders of a Member State and of the European Union—but rather *two different, irreducible territories*. More subtly, the legal autonomy of the European Union *vis-à-vis* its Member States implies that, for reasons very different to those contemplated by Jellinek, it is indeed the case that “only *one* [polity] can deploy its power on one and the same territory”. For if territoriality conjoins normative and physical dimensions, then it is *analytically true* that the unity of a territory is ingredient to the unity a legal order claims for itself and vice versa.³¹

b) The external borders of the Member States give rise to the distinction between an own territory and foreign territories. Notice, however, that this distinction is by no means geographical, as assumed by the legal doctrine, but normative through and through: at issue is the distinction between legal and illegal sojourn in the European Union. For the purposes of an Area of Freedom, Security and Justice, the external borders of the Member States illustrate the two basic modes by which a legal order organizes placiality. On the one hand, citizens of the Union and legally resident third-country nationals *abide* in the area, in the twofold sense of abiding in a place and abiding by the law. They are “emplaced”, located where they ought to be. On the other hand, illegal migrants *trespass*, cross over, in the double sense of becoming “misplaced” and crossing the law. The trespasser relates to the Area of Freedom, Security and Justice in the form of not-where-s/he-ought-to-be, and is, as such, amenable to (detention and) repatriation.

c) The act by which the European Union closes itself off from the rest of the world as an Area of Freedom, Security and Justice also links it to the rest of the world, which appears as the place where, unless authorized to enter the European Union, third-country nationals ought to be. In other words, the external borders of the Member States—hence the positions inside and outside of these borders—are intelligible as a result of the process whereby, positing itself as a territorial unity, the European Union *co-positions* the unity of the *legal place-world* to which it belongs.³² By laying down external borders, the European Union includes itself and what it excludes in an encompassing unity of places. The European Union is not a legal enclave in what is otherwise a geographical world; the European Union can only take up a legal place in the world because, from the very beginning, it co-positions the world as an ensemble of legal places. The European Union does not, therefore, restrict its claim to commonality to the Area

³⁰ Neil MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (Oxford: Oxford University Press, 1999), p. 132.

³¹ For a critical examination of the presuppositions governing a great deal of the contemporary debate about sovereignty, see my articles “Sovereignty and the Institutionalization of Normative Order”, in *Oxford Journal of Legal Studies* 21 (2001), pp. 165–180, and “Sovereignty and Representation in the European Union”, in Neil Walker (ed.), *Sovereignty in Transition* (Oxford: Hart, 2003), pp. 87–114.

³² I borrow the expression “place-world” from Edward Casey. See Casey, *Getting Back into Place*, *supra* note 15.

of Freedom, Security and Justice: by closing itself off as a legal place, the Union also and necessarily claims to take up its place in a *common world*, such that all legally relevant behaviour has its own place within the distribution of places available in the legal place-world.

d) The paradoxical inclusion and exclusion that gives rise to the Area of Freedom, Security and Justice comes about at the external borders of Member States, which simultaneously close off *and* open up the European Union. This openness in closure manifests itself in *border crossings*. All the “individual measures” that could be imagined in the framework of Title IV ECT are ways of regulating border crossings and, therefore, of dealing with this paradox. In particular, both “restrictive” and “liberal” migration policies rest on and are called forth by the structure of closure/openness characteristic of legal borders. No simple either/or situation is at stake in such policies: a liberal migration policy is no less a way of determining how the European Union closes itself off from the rest of the world than a restrictive migration policy a way of establishing how the Union opens itself up to the world.

e) By closing itself off as an internal market, the European Union co-positions the rest of the legal place-world as an external market; the European Union anticipates the legal place-world as a *market*. So, in the very process of co-positing an outside with respect to its inside, the European Union asserts that all behaviour relevant to the European Union ought to find its place on one or the other side of the divide between an internal and an external market. More pointedly, the very distinction between legal and illegal border-crossings of third country nationals rests on the presupposition that the territorial unity of the EU is intelligible with respect to the unity of the market and vice versa. This presupposition of intelligibility is called into question when the external borders of the Member States become the locus of crossings that not merely trespass those borders but also *transgress* them. Indeed, the “individual measures” relating to migration policy in the framework of the Area of Freedom, Security and Justice have been governed, implicitly or explicitly, by the distinction between political asylum seekers and economic migrants. The migratory fluxes reaching the European Union challenge, transgress, this principle for regulating border-crossings, and with it, the qualification of economically motivated border-crossings as illegal. Such border-crossings make manifest an *outside* of the European Union in a strong sense of the word, that is, a “where” that is *elsewhere*—a “heterotopia”, as Michel Foucault calls this kind of place.³³ Indeed, precisely because the European Union takes up a place in the world by closing itself off as an internal market in which freedom, security and justice are to reign, challenges to the Union’s external borders not only call into question what the Union claims to be its own place but also—and literally—the place it claims for itself in the world. In this strong sense, an outside calls into question the Union’s claim that the Area of Freedom, Security and Justice is a common place within a *common world*.

f) This second, strong manifestation of the outside of a legal space, can also reveal itself in the transgression of an “internal” boundary that stakes out a legally pro-

³³ In a well-known article, Foucault distinguishes between utopias and heterotopias. In contrast to utopias, which are fundamentally unreal spaces, whether they present society in a perfected form or its inverted image (anti-utopias), heterotopias are “outside of all places, even though it may be possible to indicate their location in reality”. Michel Foucault, “Of Other Spaces”, in *Diacritics* 24 (1986), p. 16. Typical for modernity, he argues, are “heterotopias of deviation: those in which individuals whose behavior is deviant in relation to the required mean or norm are placed” (*Id.*, at 25). Examples of such heterotopias are, in his view, rest homes, psychiatric hospitals and prisons.

tected place within the European Union. The demonstrations and disturbances attending the Intergovernmental Conference convened to sign the Amsterdam Treaty eloquently illustrate this point. On the evening of 15 June 1997, “a group of 300 demonstrators gathered outside ‘Café Vrankrijk,’ a well-known squat in Amsterdam, with the aim of holding a peaceful protest outside police headquarters supporting others already being held by the police. All 300 were eventually detained before they ever reached their destination . . .”³⁴ The question is this: *where* were the demonstrators coming from? The squat they came from is an ambiguous place. For the Dutch legal order, Café Vrankrijk is a building occupied without right or title or payment of rent; the squatters are trespassers amenable to eviction, and the squat a “misplace”. But it is more than that: by entering the building, the squatters also *transgress* a legal boundary, calling into question what counts as being in place. If trespass entails misplacement, transgression entails *displacement*, that is, laying claim to a place for which there is no place in a legal order. Café Vrankrijk is such a non-place in the distribution of legal places called forth by a capitalist economy. By gathering around Café Vrankrijk, before heading towards police headquarters, the demonstrators take up their place in this non-place, transforming it into a non-place inserted in the European internal market. The squat the demonstrators are coming from is inside the European Union—and outside of it.

If the demonstrators come from elsewhere, *where* are they going? To police headquarters, we are told, where their fellow demonstrators are being held. Having been shut up in police headquarters, these demonstrators, so the police avers, have been put-into-legal-place. Notice the inverted symmetry: whereas the squatters are misplaced, the arrested demonstrators are in place. For the law, the squat and police headquarters exemplify the two modes of place intelligible to a legal order, namely a “misplace” and an own place. Yet, for the demonstrators, the opposite inverted symmetry is at stake: the squatters are in place, and the arrested demonstrators misplaced; whereas the squat is an own place, police headquarters is a “misplace”. By heading towards police headquarters to demonstrate against the detention of their companions, they challenge a legal border, the concrete (in the twofold sense of the term) walls of police headquarters. By heading towards police headquarters, they contest its legal qualification as an own place. By heading towards police headquarters, they connect this place to the squat, uniting both into a single distribution of places. By heading towards police headquarters, the demonstrators are leaving, going elsewhere—outside the European Union.

This Section began by noting that an inside and an own place are two sides of the same coin. A legal topology of the Area of Freedom, Security and Justice confirms this insight, but also suggests that these terms are correlated in two different ways. In a first sense, the determination of inside as an own place goes together with that of outside as a *foreign* place, such that both belong together in a single distribution of places. This sense of the inside/outside distinction is contingent, for it refers to legal orders that are “limited” in space, as the legal doctrine puts it. In a second sense, the determination of inside as an own place is correlative to that of an outside as a *strange* place, as a place that does not fit into a single distribution of places together with the own place. In this second sense, the concept of an “unlimited” territory is a contradiction in terms: to be *legal*, a territory is perforce bounded, including one that has a global reach. Beck

³⁴ “Netherlands: Hundreds held during Summit”, in *Statewatch Bulletin* 7 (1997) 3.

notwithstanding, every legal order has an outside in this strong sense, whether latent or actual. Crucially, these two manifestations of exteriority do not necessarily coincide: the place from which a foreigner comes, when entering the European Union, need not be strange; conversely, a strange place need not be foreign: it can erupt from within what the European Union calls its own place.

2. Citizenship and Territoriality

The introduction to this paper espoused the thesis that one of the most challenging political and philosophical claims raised by the Amsterdam Treaty, a claim recently reiterated by the draft Constitution for Europe, is that place is ingredient to the very possibility and concrete actualisation of freedom, security and freedom. Does the foregoing topology of the Area bear out this view?

At first blush, this idea is uncontroversial and even trite, hardly a “challenge” at all: it simply expresses the fact that by closing itself off as an inside over and against an outside, the European Union continues to depend on the territorial paradigm of the nation-state. Indeed, no exceptional acumen is required to see why, in the context of the European Union, freedom, security and justice presuppose this legal community’s territorial unity. Freedom, as the free movement of persons, depends on the boundary that closes off the internal market from an external market. The “persons” involved are, to be sure, citizens and legally resident third country nationals, individuals who abide in the Area. Security, too, is bounded; in the Commission’s words, “[t]he full benefits of any area of freedom will never be enjoyed unless they are exercised in an area where people can feel safe and secure”.³⁵ Obviously, the Commission does not make security extensive to illegal immigrants or to those who engage in transnational criminal activities. On the contrary, security is all about enforcing the external borders of the European Union against trespass. Finally, the European Commission plays down the high-flown word “justice” and settles instead for the more down-to-earth “*system* of justice”, arguing that realizing an Area of Justice requires “both access to justice and full judicial cooperation among Member States”.³⁶ The point of the matter is, of course, that *access* to justice must be taken literally, for the judicial system is made available to citizens of the Union and to legally resident third country nationals, that is, to those who abide in the Area of Justice.

Importantly, territorial unity is not only instrumental to freedom, security and justice but also to *citizenship*. In the Commission’s words, “[t]hese three inseparable concepts have one common denominator—people—and one cannot be achieved in full without the other two”.³⁷ At the same time that the Commission’s usage of the term “people” embraces two specific categories of persons—Union citizens and legally resident third country nationals—it masks the essential point that freedom, security and justice presuppose the fundamental distinction between political equality and inequality, between those who are and those who are not members of the community. For, despite its bland inclusiveness, “people” is by no means synonymous with “human beings”, as though the European Union were about promoting universal human equality; on the contrary, the European Commission rules out such equality to be able to identify the usufructuaries of freedom, security and justice: the citizens of European Union and,

³⁵ *Comm. 459/98*, *supra* note 24, at 155.

³⁶ *Id.*, at 156.

³⁷ *Id.*, at 152.

when deemed appropriate by this community of citizens, third country nationals. Accordingly, although all three values are, or at least ought to be, on equal footing, all three are rooted in the principle of justice, namely treating those who are equal equally, and those who are unequal unequally. In turn, the principle of justice can only get off the ground and become the guiding principle of the Area of Freedom, Security and Justice if the differentiation between political equality and inequality is linked to a closure that differentiates a territory as an inside over and against an outside: European citizenship is *emplaced* citizenship.

Although politically of great consequence, none of this is conceptually heady stuff. For a sociology of globalisation, it all follows from the contingent fact that the European Union continues to pay tribute to the territorial paradigm of the nation-state. Alternatively, on a reading that seems politically more charitable and conceptually more demanding, although the Union has not yet succeeded in wresting free of the territorial citizenship of the nation-state, European citizenship, as regulated in Articles 17-22 ECT, marks an intermediate stage on the road toward deterritorialised “world citizenship”.³⁸ European citizenship prefigures a phase in human history in which political equality, finally liberated from territoriality, would be identical to human equality. Globalization, it seems, gives the nay to the thesis, intimated at the outset of this paper, that freedom, security and justice are *necessarily* territorially bound.

Beck’s objection is only plausible as long as one assumes that the emplacement of freedom, security and justice, no less than of citizenship, is tied to the first sense of inside and outside discussed earlier, namely the determination of an inside as an own place, in contradistinction to foreign places. But this assumption is mistaken. To see why, let us consider a hypothetical world-state. Regardless of the organizational principle that were to be adopted when founding a world-state, this novel legal community would have to claim that it holds sway over a *common place*. In this it would be no different from a nation-state or the European Union; the claim is constitutive for a legal community as such. In other words, if the world were ever to become the territory of a state, it would not be simply the material substrate or precondition of a legal order—the “earth”, as one might call this substrate—but rather the concrete unity of the normative and physical dimensions that render it intelligible as a common place. In effect, a world-state would arise in the process of selecting certain values as worthy of legal protection and setting boundaries that define what counts as emplaced—and misplaced—behaviour. Although freedom would no longer be tied to boundaries that differentiate between the world community’s own territory and foreign territories, a world-state could not realize freedom, in its basic manifestation as freedom of movement, without boundaries that define legal emplacement and misplacement. The same holds for security: protection against breaches of legality involves enforcement of the boundaries that determine where behaviour ought to take place. If, finally, one defines global justice, analogously to the Area of Freedom, Security and Justice, as the right granted to the citizens of a world-state to avail themselves of the judicial system in their daily transactions, this franchise presupposes that the world citizen is committed, *qua citizen*, to the values the world-state claims to be common, hence to conserving the territorial integrity of this community by respecting the boundaries that establish what counts as being in-legal-place.

³⁸ Beck, *Demokratie*, *supra* note 4, at 35.

The corollary to this insight is that the equality presupposed in world citizenship could by no means be identified with universal human equality. Citizenship in a world-state would institute *political* equality, which, as Arendt correctly contends, “is not given us, but is the result of human organization insofar as it is guided by the principle of justice. We are not born equal; we become equal as members of a group on the strength of our decision to guarantee ourselves mutually equal rights”.³⁹ Because this decision involves selecting certain values as worthy of legal protection and discarding others as irrelevant, the institution of political equality in a world-state inevitably opens up the possibility of political inequality, such that “world citizenship” could ultimately be withdrawn from individuals who, appealing to values that have been cast aside by the world community as legally irrelevant, radically contest its claim to instituting a common place where freedom, security and justice are to reign. The realization of “global” freedom, security and justice is unimaginable unless the “world” becomes a place, a bounded region, which is another way of saying that “world citizenship” is necessarily *emplaced* citizenship.

In short, although it is certainly the case that the European Union is a contingent manifestation of the territorial boundedness of freedom, security and justice, the territorial boundedness of these values is not itself contingent. Relatedly, it would of course have been possible for the Amsterdam Treaty to make no reference at all to an *Area*, announcing instead that it aspired to realize freedom, security and justice *tout court*. Nor, for that matter, is there an a priori reason that compels grouping these three policy fields into a single project.⁴⁰ But the very possibility and concrete realization of these values, whether separately or jointly, depends on boundaries that determine the territorial unity of a legal community, be it a nation-state, the European Union or a hypothetical world-state.

Hence, the European Union emplaces freedom, security and justice not because it is a legal community “limited” in space, but because it is a legal community. Despite their differences, a deeper parallel emerges between the European Union and a hypothetical world-state: in both—and all other imaginable—legal communities, the realization of freedom, security and justice relies on boundaries that determine what counts as being in-legal-place. This is not to deny, of course, that the external borders of the Union play a vital role in the manner in which it emplaces this triad of values. But the Union’s external borders play this role to the extent that they are a manifestation of the divide no legal community can do without: emplacement and misplacement. The external borders of the Union only reveal a strong form of externality when they are transgressed, that is, when what counts as being in one’s own place in the distribution of places made available by the legal place-world is called into question, as is the case with stateless persons who do not have an own place to which they can be repatriated. For the same reason, as the demonstrations around Café Vrankrijk show, the emplacement of freedom, security and justice realized by the European Union can also be contested from within its external borders. In this strong sense of an outside, *all* the boundaries

³⁹ Hannah Arendt, *The Origins of Totalitarianism* (New York: Harcourt Brace, 1951), p. 301 [hereinafter cited as *Totalitarianism*].

⁴⁰ In a perceptive article, Neil Walker points out that there is no thematic, historical or institutional coherence that justifies bringing together the issues dealt with in the Area of Freedom, Security and Justice. Coherence, he suggests, is primarily a matter of policy-making and of constitutional design. See Neil Walker, “In Search of the Area of Freedom, Security and Justice: A Constitutional Odyssey”, forthcoming in Neil Walker (ed.), *Europe’s Area of Freedom, Security and Justice* (2004).

that establish what counts as being legally-in-place in the Union are its *external* boundaries; the external borders of the Union, in the sense of Article 61(a) ECT, are but a species thereof. The transgression of these borders reveals an outside such that freedom, security and justice appear as located *elsewhere* than in the European Union—and *elsewhere* than in the legal place-world in which it takes up its place.

IV. A Legal Topogenesis of the Area

Let us briefly take stock of where we stand before moving on. The central thesis of Section II is that the realization of freedom, security and justice is tied to the reflexive process by which the Union lays claim to a place of its own and enforces this claim. Section III concentrates on disentangling two distinct senses in which the Union claims that the Area is its own place and showing how this claim impinges on the emplacement of freedom, security and justice. Now, we must turn to the other part of this thesis, the *self*-closure of the Union into an Area of Freedom, Security and Justice. This passage involves the shift from a static to a dynamic perspective. Indeed, it has been necessary, in view of sketching out a legal topology of the Area, to take for granted that the Union's self-closure has already come about. In other words, Section III construes "emplacement" as a noun, as the location of something, neglecting its verbal form as the act of locating something or putting it into place. Accordingly, a legal topology must now make way for a *legal topogenesis*: what is the nature of the act whereby the European Union closes itself by positing the boundaries of the Area of Freedom, Security and Justice?

1. The Self-Closure of the European Union

Even a cursory reading of the Treaties suggests that this act is reflexive. Consider, to begin with, Article 1 TEU: "By this Treaty, the High Contracting Parties establish among *themselves* a European Union, hereinafter called 'the Union'" (emphasis added). This reflexive formulation is no less prominent in Article 1 ECT: "By this Treaty, the High Contracting parties establish among *themselves* a European Community" (emphasis added). Nor is it coincidental, finally, that this reflexive formulation resurfaces in Article 2 TEU: "The Union shall set *itself* the following objectives: . . . – to maintain and develop the Union as an area of freedom, security and justice . . ." (emphasis added). If Articles 1 and 2 TEU are merged together and formulated in the first person plural form, they read as follows: "By this Treaty, we, the High Contracting Parties, agree to establish, maintain and develop among ourselves an Area of Freedom, Security and Justice . . ." It is fairly straightforward why, in line with these Articles, the Union closes *itself* by staking out the Area as its own place. In effect, closure has a reflexive structure because a community of individuals is deemed to be both the subject that creates the Area and its beneficiary, and this is simply another way of saying that the Area is the European Union's own place.

But this remains a highly general and abstract explanation that says little or nothing about how this self-closure comes about. In fact, closer inspection indicates that a latent riddle governs the reflexive formulation of Articles 1 and 2 TEU. Arendt, in the passage cited toward the end of the foregoing Section, inadvertently discloses the nature of this riddle: "We are not born equal; we become equal as members of a group on the strength of our decision to guarantee *ourselves* mutually equal rights" (emphasis

added). At the same time that Arendt's observation calls attention to the reflexivity inherent to the foundational act of a community, it passes over in silence the decisive question: who belongs to the "we" that decide to band together and grant themselves mutual rights? If, as she correctly notes, "equality is not given us, but is the result of human organization insofar as it is guided by the principle of justice", how is the principle of justice identified that allows of selecting the politically equal, and differentiating them from the politically unequal? Clearly, the measure of political equality cannot itself be the object of a decision among political equals, for this leads to an infinite regress.⁴¹ How then can a manifold of individuals at all call itself a "we" and, as a collective self, become the subject and beneficiary of a legal order? How is the *self*-constitution of a community at all possible?

This is no purely theoretical conundrum, far removed from Articles 1 and 2 TEU. Romano Prodi's plaintive question at the summit of Helsinki in 1999, "Where does Europe end?"⁴², reveals that the issue of membership is at the core of these Articles. Yet Prodi's question, by suggesting that this issue only materializes at the final stages of European integration, conceals that it arose at the *outset* of the European project. If one rereads the introductory passages of Communication 459/98 with this problem in mind, one cannot help being struck by a circularity governing the Commission's reasoning:

The three notions of freedom, security and justice are closely interlinked. Freedom loses much of its meaning if it cannot be enjoyed in a secure environment and with the full backing of a system of justice in which all Union citizens and residents can have confidence. These three inseparable concepts have one common denominator—people—and one cannot be achieved in full without the other two.

The gist of the passage is that exclusion from (and inclusion in) the Area is justified because this territory is the own place of European citizens; yet, to begin with, exclusion (and its attendant inclusion) gives rise to European citizens and their own place. Flying in the face of Arendt's admonition about equality being the outcome of a collective decision, the Commission effectively asserts that territorial unity is "given us". It would be a mistake to immediately draw the conclusion that this circularity is vicious. Does it not rather intimate that the regress confronting the problem of membership in the European Union can only be avoided if the act that posits the Union's boundaries presupposes, rather than justifies, its territorial unity? Would not the aforementioned passage attest to the productive character of the Commission's reasoning, such that a manifold of individuals can only become a "we" by way of a foundational act that presupposes that this manifold is already a unity, a "we"?

Consider, once again, the passage immediately preceding the Commission's circular reasoning in Communication 459/98:

The concept enshrines at European Union level the essence of what we derive from our democratic traditions and what we understand by the rule of law. The common values underly-

⁴¹ I am indebted here to Bert van Roermund, who has exposed a comparable problem in Jürgen Habermas's discourse principle. See Bert van Roermund, *Law, Narrative and Reality: An Essay in Intercepting Politics* (Dordrecht: Kluwer Academic Publishers, 1997), p. 151. He links this problem to collective reflexivity in a powerful article, "First-Person Plural Legislature: Political Reflexivity and Representation", in *Philosophical Explorations* 6 (2003), pp. 235-250.

⁴² Cited in Xavier Vidal-Folch, "Los límites del club Europa: La futura ampliación hasta 28 países abre el debate hasta dónde llega Europa y dónde debe terminar la UE", *El País*, 14 December 1999.

ing the objective of an area of freedom, security and justice are indeed longstanding principles of the modern democracies of the European Union.

In light of the fact that the city of Amsterdam was the locus of sizeable demonstrations against the signing of the very Treaty that ushered in the Area of Freedom, Security and Justice, it is tempting to dismiss this passage as an exercise in political cynicism. But to leave it at that would be to miss its fundamental significance for the topogenesis of the Area of Freedom, Security and Justice. Indeed, closer scrutiny of this passage reveals that a temporal paradox governs the process of positing the boundaries that give rise to the Area's territorial unity: the Commission claims that the boundaries that close off the Area of Freedom, Security and Justice into the Union's own place had been drawn *prior* to the Amsterdam Treaty, hence that these boundaries simply obtain legal expression in this Treaty.

The Commission's move is by no means unique; it repeats the gesture that gave rise to the European Community in the first place. The Preamble to the Treaty of Rome begins with a passage that has remained well nigh unchanged in all later treaties: the signatories to the Treaty of Rome are "determined to lay the foundations of an ever closer union among the peoples of Europe". Commentators do not tire of emphasizing that the Preamble refers to "peoples" in the plural, rather than to "people" in the singular, concluding that the European Community/Union is not a federal polity. This conclusion stands beyond doubt, as does the fact that European integration is not a zero-sum game that confronts its participants with the choice of either merging into a single people or remaining separate peoples. Remarkably, however, commentators lose sight of the no less evident fact that by referring to an "*ever closer union* of European peoples", the Preamble not only posits unity as the future vanishing point of the integrative process but also claims that there *already* was a union at the time of laying its legal foundation in the Treaty of Rome, a community of peoples that, by virtue of their shared values, can go further together, engaging in a process of legal and economic integration. So, the circularity hidden in Communication 459/98 is of old stock: the wording of the Preamble implies that the Treaty of Rome does not *initiate* the community of European peoples; the Treaty claims to *build* on a prior closure, providing this community with an institutional setting and specific goals.⁴³

Moreover, the Preamble to the Treaty of Rome views Europe as being itself *already* the product of an aboriginal scission that separates an undifferentiated space into two places: Europe and the rest of the world. The datable act of positing the European Community's boundaries claims to derive from a closure lost in an irretrievable, undatable past. In its own way, the Preamble to the Treaty of Rome activates the basic cosmogonic principle:

"[T]here is never merely only one place anywhere, not even in the process of creation. It is as if cosmogony respected the general rule enunciated by Aristotle in another connection: 'the minimum number, strictly speaking, is two.' To create in the first place is *eo ipse* to create two places".⁴⁴

⁴³ This temporal paradox, which becomes visible at moments of foundation, is operant in the European Court of Justice's landmark case, *Van Gend & Loos*, a foundational moment *par excellence*. For an extended analysis of this ruling that inverts the tense of the expression *acquis communautaire* to ask what it takes to "acquire"—to found—a community, see my article "Acquiring a Community: Constituent Power and the Institution of European Legal Order", in *European Law Journal* 9 (2003), pp. 433-450.

⁴⁴ Casey, *The Fate of Place*, *supra* note 15, at 12.

It had been noted, when sketching out a legal topology of the Area of Freedom, Security and Justice, that the European Union includes itself and what it excludes in an encompassing distribution of places, the legal place-world. It now becomes clear that this feature of the Area leads back to its topogenesis: by evoking the primal cut that created “two places”, the Preamble not only assures the European Union of a place of its own, but also of a place within a single distribution of places, that is, within a world that is held to be common. The fundamental distinction between those who abide in the Area of Freedom, Security and Justice, and those who trespass its borders, is already prepared in the Treaty of Rome, which only gives legal form, so it claims, to a cut that established at the dawn of history who belongs where. Thus, the European Union’s territorial unity and temporal unity are constituted in a mutually implicative process: the Union closes itself by “temporalising”, that is, by structuring past, present and future into the unity of a common history; conversely, the historical unity of the Union is spun in the ongoing process by which the Union emplaces itself, that is, stakes out a place of its own.

Importantly, this topogenesis confirms the view that territoriality is concrete, as opposed to the abstract view of territoriality endorsed by the legal doctrine: the Area of Freedom, Security and Justice is held to be a common place because Europe is originally the common place, common by virtue of being, from the very beginning, a *unity at once normative and physical*, not an empty tract within the undifferentiated expanse of the earth. The foundation of the European Union/Community is by no means an act that superimposes a normative “layer”, as it were, on what was originally an empty surface; the European Union, so claims its foundational act, gives legal expression to what is from the outset a territory, a concrete unity conjoining normative and physical dimensions.⁴⁵

All of this is at work in the apparently innocuous reflexive formulations of Articles 1 and 2 TEU, and 1 ECT. Returning to Arendt’s predicament, which is the predicament of the self-constitution of a legal community, the Preamble to the Treaty of Rome reveals that power deploys a representational logic to be able to found a legal community: “we become equal”—as members of the European Union—on the basis of the claim that “we are already equal”—as Europeans—. A topogenetic inquiry reveals that Articles 1 TEU and 1 ECT mark the *self-constitution* of the European Union/Community in the two senses corresponding to the subjective and objective modes of the genitive: constitution *by* a collective self and constitution *of* a collective self.

2. Absence in Presence

All is well and good; but does this analysis not end up providing a conceptual alibi for the reification of the Area of Freedom, Security and Justice? Is not the circularity governing the Commission’s reasoning in Communication 459/98 exemplary for the hypostasis of territorial unity? A question posed earlier returns in acute form: if the Union cannot create this Area without presupposing that Europe is already closed, does this

⁴⁵ A recent contribution to the problem of European identity illustrates this point and its linkage to the temporal paradox governing the process of self-closure: “In a strictly geographical sense, Europe does not have a precise border. The European idea has taken root in a common way of feeling, of thinking, of willing, that surpasses statal and technical limits . . .” See Michel Albert, Raymond Barre et. al., “La dynamique d’une riche identité commune, par un collectif de personnalités européennes”, in *Le Monde*, 13 November 2003.

not entail that the Area is but the privileged instrument by means of which legal power implements and enforces a politics of exclusion?

An answer to this question hinges on the relation of legal power to territoriality. As has been noted heretofore, the legal doctrine reduces territoriality to a precondition of legal power; a territory is no more than the physical substrate of acts of power. Building on this unquestioned assumption, legal philosophers generally define legal power as the capacity to change a subject's legal status through the ascription of rights and obligations. To cite a perspicuous definition,

[n]ormative power is the ability to take decisions that change what a person ought to do or ought not to do, or may or may not do, or what a person is able or unable to do, in the framework of some normative order, with or without the other person's consent to this change.⁴⁶

Yet if a territory is the concrete unity of normative and physical dimensions, then the relation between territoriality and legal power is far more intimate than meets the eye in this definition. On the one hand, the definition overlooks the fact that legal power is essentially spatialising, or more properly, placialising: *to ascribe rights and obligations is also always to assign a legal place to persons—to emplace them—and vice versa*. Authorizations to third country nationals to enter the Area of Freedom, Security and Justice, or the repatriation of illegal immigrants, are not the exceptional cases in which legal power emplaces; instead, these acts are particularly striking manifestations of what legal power always claims to do: to assign to each her/his own place.

On the other hand, legal power can only emplace persons by claiming to be *itself* emplaced; to borrow a famous expression coined by H.L.A. Hart, a legal official adopts an “internal point of view”.⁴⁷ This enigmatic formula has been the object of considerable controversy. It suffices to note, for the purpose of this paper, that the internal point of view consists, in the words of an able interpreter of Hart, in

the committed point of view. It expresses the idea that sometimes a rule is action-guiding because it is viewed by those to whom it applies as reason-giving. Those who accept rules from an internal point of view see the rules as reason-giving in virtue of their being rules rather than in virtue of the sanction that might attend non-compliance with them.⁴⁸

Remarkably, however, neither Hart nor his commentators have considered the possibility that the idea of an “internal” point of view should be taken literally, such that not only is the internal point of view committed but also, and conversely, a committed point of view is necessarily *internal*, i.e. placially determined. For if, as argued heretofore, a legal territory is the concrete unity of normative and physical dimensions, then a normative commitment—and this is ultimately a commitment to the common interest—is *eo ipse* an internal commitment—that is, a commitment to a common place—and vice versa.

Yet if legal authorities emplace human behaviour by virtue of being themselves emplaced, to whom do they owe their own emplacement? How, in other words, does

⁴⁶ Neil MacCormick, “Powers and Power-Conferring Norms”, in Stanley L. Paulson & Bonnie Litschewski Paulson (eds.) *Normativity and Norms: Critical Perspectives on Kelsenian Themes* (Oxford: Clarendon Press, 1998), p. 495.

⁴⁷ H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1994), pp. 89, 242.

⁴⁸ Jules Coleman, “Incorporationism, Conventionality, and the Practical Difference Thesis”, in Jules Coleman (ed.), *Hart's Postscript: Essays on the Postscript to the Concept of Law* (Oxford: Oxford University Press, 2001), p. 110.

the internal perspective arise, without which legal authorities could not emplace freedom, security and justice? To pose this question is to return to the circularity hidden in Communication 459/98: exclusion from (and inclusion in) the Area is justified because this territory is the own place of European citizens, yet, to begin with, exclusion (and its attendant inclusion) gives rise to European citizens and their own place. Hence, the question about the reification of territorial unity is at bottom a question about the conditions under which legal power can posit the boundaries of a territory.

The upshot of the foregoing topogenetic inquiry is that while the Treaties necessarily postulate Europe as the spatio-temporal origin of the European Union, the Union has no direct access to its origin. Europe can function as the origin of the European Union only if it is not in empirical space and time. More precisely, legal power has no direct access to the aboriginal scission that gives rise to Europe, on the one hand, and the rest of the world, on the other. Instead, Europe only appears *indirectly*, by way of what legal power claims to be its representations: the internal market and the Area of Freedom, Security and Justice. So, paradoxically, everything begins with the representation; the original place of the European Union is necessarily a represented place, and its boundaries, represented boundaries. Consequently, Europe is, properly speaking, a *utopia*; it is nowhere and “nowhen”. The self-closure of the European Union comes about in the process by which legal power designates an empirically identifiable place and time by way of a detour through a first place and time that never could have been—and never can become—a “here” and a “now”. The act of self-closure by which the Union creates the Area of Freedom, Security and Justice takes on the paradoxical form of an irrevocable *absence in presence*. This paradox cannot simply be dismissed as a regrettable feature of the European Union, a blemish that marks its dubious democratic credentials; the reflexivity implied in self-legislation, self-determination and the like is necessarily mediate, representational. Any attempt to collapse the self-reference of a community into pure presence, such that the presence to itself of a community in an absolute “here” and “now” would attest to and guarantee its *self*-foundation, yields to the temptation of a metaphysics of presence.⁴⁹

The paradox of absence in presence also attaches to the European Union’s claim to an *own* place: it would not be possible for legal power to claim that the Area of Freedom, Security and Justice is the European Union’s own place unless this area is held to give legal expression to what is primordially the Union’s own—Europe, but what is primordially its own definitively *eludes* the European Union. Two implications flow from this insight. On the one hand, legal power is continuously called on to redefine the Union’s territorial unity precisely because it has no direct access to Europe as the original place. In other words, legal power must unceasingly establish what defines the internal market and the Area of Freedom, Security and Justice as a *common place*, i.e. as the European Union’s own place. This is tantamount to recognizing that the European

⁴⁹ Although this issue falls beyond the scope of this paper, this is precisely the fundamental flaw of Hannah Arendt’s analysis of power. It has already been noted that she cannot account for the conditions by which a plurality of individuals identify themselves as a “we”. The reason for this becomes clear in her book, *On Revolution*, which is governed by the fundamental opposition between “representation versus action and participation”. Having set up this opposition, she then goes ahead to equate action and participation with *self*-government. She neither poses nor answers the question whether representation, in the sense discussed in the topogenesis of the European Union, is ingredient to action and participation. Arendt’s description of her favoured models of self-government—the revolutionary councils and soviets—confirms, on closer scrutiny, the constitutive role of representation for self-government. See Hannah Arendt, *On Revolution* (London: Penguin, 1990 [1963]), p. 273.

Union's place in the legal place-world is not *fixed*. Obviously, this does not mean that the European Union "moves around" in the world, as human beings do. But the successive enlargements of this polity, as well as the sundry modifications of the conditions governing internal and external border crossings, would be unintelligible unless the European Union has to take up a relation *to* place—and *to itself*. On the other hand, the gap, both spatial and temporal, between Europe and the European Union is final, irreducible. It explains why legal power can claim that by positing the Area of Freedom, Security and Justice it fulfils a European aspiration, yet also why the realization of the Area can be radically contested in the name of another Europe, of another emplacement of freedom, security and justice that is—literally—elsewhere and "elsewhen". The irreducible gap between Europe and the European Union ensures that Europe is never entirely the European Union's own place; the Union's territorial unity is a *claimed* unity, its identity a *claimed* identity. The paradoxical absence in presence that governs the exercise of legal power ensures that freedom, security and justice are in place *and* not in place in the European Union.

V. European Public Order

Yet to believe that these considerations exhaust the relation between legal power and territorial unity would be too pat, too reassuring, too comfortable. After all, as critics repeatedly point out, security, construed in a broad sense that includes combating international organized crime and terrorism and dealing with illegal immigration, tends to eclipse freedom and justice. This diagnosis leads critics to focus their attention on the conditions, both normative and institutional, by means of which a "right balance" could be struck between these different values.⁵⁰ Although this approach is certainly valid, it neglects what is, from the perspective of this paper, the fundamental issue at stake in the establishment and development of an Area of Freedom, Security and Justice: the territorial unity of the European Union.

Consider, from this perspective, the passage of Communication 459/98, in which the issue of security obtains its most pregnant formulation:

It is in the framework of the consolidation of an area of freedom, security and justice that the concept of public order appears as the common denominator in a society based on democracy and the rule of law. With the entry into force of the Amsterdam Treaty, this concept which has hitherto been determined principally by each individual Member State will also have to be assessed in terms of the new European area. Independently of the responsibilities of Member States for maintaining public order, we will gradually have to shape a "European public order" based on an assessment of shared fundamental interests.⁵¹

Not only does the Commission make clear that the notion of public order is the specific manner in which a legal order conceptualises the problem of security but it also indicates that public order is intimately related to territorial unity. It is no coincidence that, as Article 64 (1) ECT puts it,

This title shall not affect the exercise of the responsibilities incumbent upon the Member States with regard to the maintenance of law and order and the safeguarding of *internal security* (emphasis added).

⁵⁰ See, for example, Malcom Anderson and Joanna Apap, *Striking a Balance Between Freedom, Security and Justice* (Brussels: Centre for European Policy Studies, 2002).

⁵¹ *Comm. 459/98, supra* note 24, at 156.

Significantly, the wording of this Article remains unchanged in the draft Constitution for Europe. Although transferring these responsibilities to legal officials who act on behalf of the European Union would no doubt mark a decisive step in consolidating the autonomy of the Area of Freedom, Security and Justice *vis-à-vis* the Member States, the core issue involved in shaping a European public order would remain unchanged: “the maintenance of law and order and the safeguarding of internal security”. So, the question that arises with respect to Article 64(1) ECT is no less acute if these powers were transferred to European authorities: what sense can be made of the responsibility for maintaining law and order and the internal security of the European Union, given the strong form of an *outside* to which the Union is by no means immune?

The implications of this question become clearer if the Commission’s reference to European public order is contrasted with a remarkable chapter of Arendt’s book, *The Origins of Totalitarianism*, in which she describes the plight of statelessness, whether *de jure* or *de facto*. Paradoxically, she asserts, at the very moment “when we have really started to live in One World”, a new group of people emerges, the stateless, “who [have] to live outside the jurisdiction of [the laws of a nation-state] without being protected by any other”.⁵² This extraordinarily hazardous condition of homelessness to which the stateless find themselves exposed is the stark reality of “falling in between” (*Zwischen-Fall*) the borders,⁵³ not the place polygamy Beck attributes to his model transnational individuals. Arendt’s analysis reminds us that the real alternative to belonging somewhere is not to be at home in several places, as Beck would have us believe, for this is still to be in place, but to belong *nowhere*, to be neither here nor there.

The crucial point, as she sees it, is that the condition of statelessness undermines the legal order itself:

Much worse than what statelessness did to the time-honored and necessary distinctions between nationals and foreigners, and to the sovereign right of states in matters of nationality and expulsion, was the damage suffered by the very structure of national legal institutions when a growing number of residents had to live outside the jurisdiction of these laws and without being protected by any other. The stateless person, without right to residence and without the right to work, had of course constantly to transgress the law. He was liable to jail sentences without ever having committing a crime. More than that, the entire hierarchy of values which pertain in civilized countries was reversed in his case. Since he was an anomaly for whom the general law did not provide, it was better for him to become an anomaly for which it did provide, that of the criminal.⁵⁴

These premonitory words, although they refer to the period between the two World Wars of the XXth century, have lost none of their relevance in the light of the current paradox confronting the fledgling European public order. As has been forcefully argued, the detention of illegal immigrants by the authorities of the Union’s Member States undermines general principles of criminal law, including adequate legal assistance, full judicial control and proportionality of the sanction with respect to the offence.⁵⁵ From the point of view of such principles, the claim that detention centres are the illegal immigrants’ *own* place within the Union, until such time as they can be repa-

⁵² Arendt, *Totalitarianism*, *supra* note 39, at 297, 286.

⁵³ Beck, *Globalization*, *supra* note 3, at 51.

⁵⁴ Arendt, *Totalitarianism*, *supra* note 39, at 286.

⁵⁵ See Anton van Kalmthout, “Eine noch unbekannte Kategorie im Freiheitsentzug: Die illegalen Immigranten”, in Andrea Baechtold & Ariane Senn (eds.), *Brennpunkt Strafvollzug* (Bern: Stämpfli Verlag, 2002), p. 239.

triated, becomes questionable on the basis of the founding principles of the Area of Freedom, Security and Justice. This example is symptomatic of a more general phenomenon: increasingly, the distinction between political asylum seekers and economic migrants at the heart of Member States' immigration policy can only be enforced by compromising the very rule of law on which the Area of Freedom, Security and Justice is held to be grounded. Increasingly, the mandate contained in Article 64(1) can only be achieved at the cost of breaching values held to be common to the European Union. By breaching these values, the acts exercised pursuant to Article 64(1) also breach the powers it confers on legal authorities to *maintain* law and order. In the process of enforcing the European Union's claim to an own place, the Area of Freedom, Security and Justice becomes unrecognisable as the Union's own place. Another Europe and another legal place-world leave their traces indirectly in the Union, by way of a territorial unity compromised from within: the breach of the rule of law required to maintain law and order and enforce internal security discloses the Union *ex negativo* as an area of servitude, of insecurity, of injustice.

This paradox acquires its most acute manifestation when the avowed aim of maintaining public order leads legal authorities to *suspend* law and order, such that, divested of its normative dimension, a territory ceases to be such. This, precisely, is what Carl Schmitt calls the "state of exception". I submit that achieving a "right balance" between freedom, security and justice is indeed a *constitutional* question, as Neil Walker argues, but first and foremost because what is at stake is holding in abeyance the paradox Schmitt was keenly aware of, namely that, during the state of exception, the constitution is suspended in order to preserve it. Independently of the features that might define the European Union as a post-national polity, the paradox accompanying the state of exception lurks as much in post-national constitutionalism as it does in national constitutionalism.⁵⁶ Linking the state of exception to territoriality, the latent paradox in the notion of European public order reaches a critical point when, to enforce the claim to the Area of Freedom, Security and Justice as the European Union's own place, legal officials *dis-own* it, as attested to by the airport waiting zones in which foreigners are detained, pending the processing of their request for refugee status by a Member State.⁵⁷ These waiting zones do not merely reveal the Union as an area of servitude, insecurity and injustice; more radically, even the possibility of this *ex negativo* characterization disappears because the legal norms by reference to which such a qualification could be uttered have been suspended with respect to the foreigners who populate these "absolute non-places".⁵⁸ By undoing the concrete unity of territoriality, such that what remains is its purely physical substrate, a parallel detachment takes place with respect to the foreigner, who, divested of her/his status as a legal subject, becomes a human being who can lay claim to nothing more than "the abstract nakedness of be-

⁵⁶ Abstracting from all differences related to functional matters, the essential criterion with which to establish whether post-national constitutionalism takes a decisive step beyond the constitutional practices of the nation-state may well be its capacity to devise institutional venues that allow it to deal with this paradox in a new way.

⁵⁷ "[A]n apparently innocuous space (for example, the Hôtel Arcades in Roissy) actually delimits a space in which the normal order is de facto suspended and in which whether or not atrocities are committed depends not on law but on the civility and ethical sense of the police who temporarily act as sovereign (for example, in the four days during which foreigners can be held in the *zone d'attente* before the intervention of the judicial authority)". Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, trans. Daniel Heller-Roazen (Stanford: Stanford University Press, 1998), p. 174.

⁵⁸ Giorgio Agamben, *État d'exception* (Paris: Seuil, 2003), p. 87.

ing human”.⁵⁹ What had been legal power now comes to stand, as naked power, over and against this abstract nakedness. Accordingly, in the same move by which a legal community dis-owns part of its territory, the community’s legal officials cease to be such in their treatment of foreigners: to dis-own a place is to disavow the acts that occur therein as acts of legal officials, bringing to a halt the self-reference of a legal community, hence democratic *self*-government. Giving the Commission’s words a twist it would certainly want to conceal, public order ultimately “appears as the common denominator in a society based on democracy and the rule of law” by virtue of suspending democracy and the rule of law.

It may well be the case that, whatever its concrete manifestations, this paradox is ultimately—that is to say, in the extreme situation—constitutive for the territorial unity of every order of positive law. In any event, dealing with this unbearable paradox now suggests the need for extreme measures by legal officials, measures, as the word’s etymology indicates, that are on the outside. On this reading of the current situation, taking on responsibility for maintaining law and order and safeguarding internal security calls on legal authorities to transgress the territorial unity of the European Union, positing its boundaries anew from a place inside and outside the Area of Freedom, Security and Justice.

⁵⁹ Arendt, *Totalitarianism*, *supra* note 39, at 297.